85-371

Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GENESIS BROADCASTING LIMITED,

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND BROADCAST COMMUNICATIONS, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 3, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

The court of appeals affirmed an order of the Federal Communications Commission (the "Commission" or "FCC") denying the application of Genesis Broadcasting Limited ("Genesis") for a construction permit for an FM broadcast station at Evanston, Illinois, and granting the application of Broadcast Communications, Inc. ("BCI" or "WOJO") for renewal of license for broadcast station WOJO (FM). The Commission's order was based on its conclusion that the renewal applicant deserved a significant comparative preference, termed a "renewal expectancy," for its past broadcast record, which outweighed Genesis' substantial structural preferences for adding to the diversification of ownership of the mass media and proposing the participation of all of its ownership in station management. The following question is presented:

> Whether, contrary to this Court's decision in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), the reviewing court ratified a licensing decision of the FCC which, because of its result-oriented decisional bias in favor of incumbent broadcasters, effectively nullified petitioner's statutory right to a full and fair hearing challenging an incumbent broadcaster in a comparative renewal broadcast licensing proceeding.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-____

GENESIS BROADCASTING LIMITED,

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND BROADCAST COMMUNICATIONS, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Genesis Broadcasting Limited* respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals appears in the Appendix to this petition (App. B). Suggestion for rehearing *en banc* was denied by Order entered June 4, 1985. The Memorandum Opinion and Order of the Federal Communi-

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*Genesis Broadcasting Limited has no parent, subsidiary or affiliated companies.

cations Commission, reported at 97 FCC 2d 61 (1984), also appears in the Appendix to this petition (App. C).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 29, 1985 (App. B). A timely suggestion for rehearing *en banc* was denied on June 4, 1985 (App. A). The jurisdiction of this Court is invoked under 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 47:

Section 301 - License for Radio Communication or Transmission of Energy

It is the purpose of the this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license . . . .

Section 304 - Waiver by Licensee

No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 309-Action Upon Applications; Form of and Conditions Attached to Licensees

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interests shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

STATEMENT

This petition seeks review of a judgment (App. B) affirming an order of the Federal Communications Commission (App. C) denying the application of comparative challenger Genesis and granting the application of incumbent broadcaster, BCI for renewal of license for station WOJO, Evanston, Illinois.[1]

Petitioner Genesis is comprised of two local citizens, who, in 1976, filed an application to supplant BCI as the operator of WOJO because of their dissatisfaction with the minimal broadcast service being provided by that station to its community of license. Genesis filed its application under the belief that it would be awarded those full hearing rights guaranteed to all comparative applicants under Section

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[1] *Broadcast Communications, Inc.*, 97 FCC 2d 61 (1984).

309(e) of the Communications Act, 47 U.S.C. § 309(e), and *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

The Commission's order granting BCI renewal was based on the FCC's conclusion that the incumbent's past broadcast record at WOJO was substantial and that the licensee therefore deserved a renewal expectancy. The Commission's finding of substantial performance was made despite the following evidentiary facts:

> (1) During the relevant license period, WOJO, the only fulltime station operating in Evanston, a city of over 80,000 people, broadcast exactly one public affairs program addressing the ascertained problems and needs of its community of license. Even that program was broadcast only intermittently one-half hour per week. J. A. 24[2]
>
> (2) The station did virtually nothing to initiate news or public affairs programming. In fact, BCI maintained no news staff at the station. J. A. 154. Not surprisingly, as a result, WOJO's broadcast of news and public affairs placed it at or near the bottom compared to all of the stations operating in its service area. J.A. 67, 87.
>
> (3) Testimony from Evanston public officials, as well as from other Evanston residents, established that WOJO virtually ignored and was totally indifferent to the needs and interests of its community of license. J.A. 123-124, 129-133, 182.

The Presiding Administrative Law Judge adequately summed up BCI's license term performance at WOJO when he made the following conclusion:

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[2]Citations to "J.A." refer to the Joint Appendix in the court of appeals.

> BCI did not demonstrate that the quality of its programming was superior or even substantial. On a quantitative basis, it is evident that the station generally performed in the just acceptable range. J.A. 188.

Faced with the incumbent broadcaster's record of minimal service, and recognizing Genesis' structural comparative strengths, the FCC manufactured a "substantial" broadcast record for the renewal applicant. The Commission offered excuses for WOJO's programming failures, while, at the same time, it reviewed the record for anything it could find which could be cited in support of a finding of above average performance. The Commission's result-oriented decision focused on some non-broadcast civic activities engaged in by the station (many of which occurred prior to the commencement of the relevant license period), decade old positive statements from individuals who did not submit evidence at the hearing, and the broadcast of religious services to meet ascertained local needs.

Genesis appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit. Principal among the numerous errors cited by Genesis as the basis for its appeal was the Commission's failure to follow its own enunciated renewal standards, which it had formerly declared it would rely on in determining the presence or absence of a renewal expectancy.

The court affirmed the Commission without issuing an opinion. Genesis timely filed a suggestion for rehearing *en banc*, which was also denied without opinion on June 4, 1985.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Effectively Nullified Genesis' Statutory Right To A Full and Fair Hearing.

Repeatedly, over the years, courts have noted with disapproval the FCC's attempts to set up an operational bias in

favor of incumbent licensees and the consequential erection of a presumption of renewal that is inconsistent with those full hearing *Ashbacker* rights guaranteed to challengers to renewal applicants under Section 309(e) of the Communications Act.[3] Even in those cases where they have affirmed the Commission's licensing decisions, courts have warned the Commission that its comparative renewal process should not be permitted to degenerate into an irrebutable presumption of renewal,[4] and that the Commission "may not use renewal expectancies of incumbent licensees to shortcircuit the comparative hearing."[5]

Still, the FCC has disfavored implementation of the full hearing *Ashbacker* requirement of Section 309(e) of the Act to comparative renewal proceedings. The Commission has gone so far as to recommend to Congress that Section 309 of the Act be amended to provide for a two-tiered approach to broadcast licensing renewals.[6] In the absence of that requested Congressional relief, the Commission has, on its own, on an *ad hoc* basis, set itself to repealing the full

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[3]*Committee for Community Access* v. *FCC*, 737 F.2d 74 (D.C. Cir. 1984); *Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified*, 598 F.2d 58, *cert. dismissed*, 447 U.S. 957 (1979) ("Cowles I"); *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarification granted*, 463 F.2d 822 (1972); *Greater Boston Television Corporation* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970).

[4]*Eg., Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. den.*, 103 S.Ct. 1774 (1983) ("Cowles II").

[5]*Fidelity Television Inc.* v. *FCC*, 515 F.2d 684, 709 (D.C. Cir. 1975) (Bazelon, C.J.) (voting for rehearing *en banc*), *cert. denied*, 423 U.S. 926 (1975).

[6]*Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process (Notice of Inquiry)*, 88 FCC 2d 120, 121 n. 1 (1981).

hearing requirement of Section 309(e) of the Act in comparative renewals.

The Commission has attempted to accomplish this task through adoption of a licensing approach which, on its face, appears eminently reasonable, but, which in practice, is so heavily weighed in favor of incumbent broadcasters that it amounts to a fraud on the comparative challenger and on the listening public. The instant case provides ample documentation that, at the Commission, the "tacit presumption that the incumbent licensee is to be preferred over competing applicants"[7] still reigns supreme.

Under Section 309(e) of the Communications Act, the burden of proof (as well as the burden of proceeding) in a renewal hearing is on the renewal applicant to demonstrate that grant of its renewal will serve the public interest.[8] Thus, in the instant case, it was BCI which had the statutory obligation to provide affirmative evidence demonstrating that its programming was responsive to those needs which existed in its community of license.[9] Genesis had no obligation to demonstrate unmet needs.

BCI failed to meet its statutory burden. Although BCI claimed in its written hearing exhibits that it had addressed the ascertained problems and needs of its community through its programming, its witnesses could not answer the simplest questions concerning when and how these needs and problems were addressed. Jorge Infanto, the individual offered by BCI to sponsor its programming ex-

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[7]*Cowles I, supra*, 598 F.2d at 41.

[8]*See Beebe* v. *FCC*, 61 F.2d 914, 915 (D.C. Ct.App. 1932); *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966).

[9]*See New Mexico Broadcasting Co., Inc.*, 88 FCC 2d 1469, 1473 (1982).

hibits, candidly admitted that he knew virtually nothing about the programming broadcast by WOJO during the relevant license term, including to what extent that programming was responsive to community problems. J.A. 142-149, 160-167. Despite repeated requests by Genesis, BCI failed to offer any other individual who would provide information as to the station's non-entertainment programming during the relevant license period. J.A. 144-146, 150-151, 163-164.

Despite BCI's failure to meet its Section 309(e) burden, the Commission, nevertheless, credited it with providing responsive programming and granted it a renewal expectancy.[10] Clearly, the Commission was legally incorrect in its assessment, as BCI could not properly receive a renewal expectancy for programming which it could not even show was responsive to the problems and needs of its community of license. The Commission in effect, reversed the Section 309(e) burden and, contrary to law, obligated Genesis to demonstrate why WOJO's license should not be renewed. The court of appeals judgment affirming the Commission's licensing approach permits the Commission to continue its illegal policy under which renewal is assumed rather than demonstrated on the record, contrary to the explicit terms of the FCC's authorizing statute.

2. The Decision Below Failed To Follow Those Judicially Approved Standards For Determining Licensee Performance And Instead Created An Irrebutable Presumption In Favor Of Renewal

Because the issuance of a broadcast license does not confer any proprietary interest in that license, a license

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[10] *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1164-65 (Rev. Bd. 1983) App. C at 6a-8a.

entails no right of renewal.[11] The public interest standard of the Communications Act does, however, recognize a "renewal expectancy," which, under limited circumstances, permits the Commission to attach some weight to the fact of incumbency when considering an application for renewal in a comparative hearing.

A "renewal expectancy" may not be based upon the fact of incumbency *per se*. To the contrary, the awarding of an expectancy, as well as its strength, depends on the merit of the renewal applicant's past broadcast record. According to the Commission, an incumbent broadcaster may expect to receive a legitimate renewal expectancy only when, *at the very least*, its performance has been "substantial". Substantial performance has been defined as being "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."[12] When an incumbent has rendered substantial, but not superior service, the "expectancy" takes the form of a comparative preference weighed against other comparative factors. However, an incumbent rendering minimal service receives no preference at all.[13] Minimal performance consists of performance of all statutory obligations and minimal, although adequate attention to the issues confronting the licensee's community,

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[11]47 U.S.C. §§ 301, 304.

[12]*Cowles Florida Broadcasting, Inc.*, 62 FCC 2d 953, 955-956 (1977), *vacated and remanded sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified*, 598 F.2d 58, *cert. dismissed*, 441 U.S. 957 (1979).

[13]*Cowles Broadcasting, Inc.*, 86 FCC 2d 933, 1012 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1774 (1983).

primarily, and service area outside of its community, secondarily.[14]

In permitting the establishment of a renewal expectancy, the court of appeals relied upon the Commission's commitment that such an expectancy would be factored in for the benefit of the public, not for incumbent broadcasters, and that where "the denial of a license renewal would not undermine renewal expectancy in a way harmful to the public interest, then renewal expectancy [w]ould not be invoked."[15] It is clear that, in this case, the Commission has failed to honor its commitment. In view of WOJO's license term broadcast performance, described above, it can hardly be reasonably argued that the refusal to award a renewal expectancy to WOJO would harm the listening public. WOJO's performance was no more than adequate. Under the Commission's own standards, such a record should have resulted in a finding of "minimal," rather than "substantial" performance, with no renewal expectancy being awarded to the incumbent broadcaster.

The Commission's decision to grant renewal based on the existence of such an expectancy is one step further in the emasculation of the Commission's renewal standards and the deterioration of the comparative licensing process into precisely the sort of irreversible presumption in favor of renewal that earlier courts had warned against. The court of appeals judgment in this case to defer to the Commission permits the FCC to continue to redefine downward the level of broadcast service required for the awarding of a renewal

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[14]*See Report and Order on Deregulation of Radio*, 84 FCC 2d 968, 989 n. 53, *recon. den.*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

[15]*Cowles II*, *supra*, 683 F.2d at 510.

expectancy. The consequences of that judgment will not be felt by Genesis alone, for it cannot help but lead to the dimunition of broadcast service nationally, as broadcasters recognize that the "competitive spur" previously provided through the prospect of competing applicants at renewal time has been effectively removed.

Pursuant to the terms of Section 402(b) of the Communications Act, the District of Columbia Circuit has exclusive jurisdiction over appeals from licensing decisions and orders of the FCC. The fact of that exclusive jurisdiction rules out the possibility of a conflict of circuits in Commission adjudications, a major basis for granting writs of certiorari. However, in view of the leading role played by the District of Columbia Circuit in the review of decisions of the FCC, this case calls for the exercise of supervisory power by this Court to ensure that the judgment of the court below does not depart from the norms of judicial review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

September 3, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 84-1154

GENESIS BROADCASTING LIMITED
v.
FEDERAL COMMUNICATIONS COMMISSION

JUN 4 1984

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Davis, Circuit Judge, United States Court of Appeals for the Federal Circuit

ORDER

Appellant's suggestion for rehearing *en banc*, filed May 13, 1985, has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 84-1154

GENESIS BROADCASTING LIMITED,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

BROADCASTING COMMUNICATIONS, INC.,
Intervenor

Filed MAR 29 1985

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION.
Before: WALD, EDWARDS, and DAVIS*, Circuit Judges.

JUDGMENT

This cause came on to be heard on a notice of appeal from an order of the Federal Communications Commission, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration

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*Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

by the Court. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission on appeal herein is hereby affirmed. It is

FURTHER ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

George A. Fisher
Clerk

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 84-99
95194

In re Applications of	
BROADCAST COMMUNICATIONS, INC. Evanston, Illinois	**BC Docket No. 81-157** **File Nos. BRH-85** **BRSCA-206**
For Renewal of Main, Auxiliary, and Sub-Carrier Authorization Licenses of Station WOJO (FM) Evanston, Illinois	
GENESIS BROADCASTING LIMITED Evanston, Illinois	**BC Docket No. 81-158** **File No. BPH-10386**
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: *March 15, 1984* ; Released: *March 20, 1984*

By the Commission:

1. The Commission has before it: (a) an Application for Review of the Review Board's Decision herein[1] filed May 4, 1983, by Genesis Broadcasting Limited (Genesis); (b) an Application for Review of the Review Board's Decision herein filed May 4, 1983, by Broadcast Communications, Inc. (BCI); (c) an Opposition to (a) filed June 17, 1983, by BCI; (d) an Opposition

[1] 93 FCC 2D 1162 (1983).

to (b) filed June 17, 1983, by Genesis; and (e) a Consolidated Opposition to (a) and (b) filed June 17, 1983, by the Chief, Mass Media Bureau.

2. We have determined that BCI should not receive a preference for its proposed Spanish language programming. The record evidence demonstrates that there is a substantial amount of Spanish language programming in Station WOJO's service area during the day,[2] but that at night WOJO serves an area not served by other Spanish language stations.[3] Although Evanston, Illinois has two daytime-only AM stations and one non-commercial educational FM station, Station WOJO is the only fulltime commercial station licensed to Evanston and thus provides the only local (Evanston) commercial radio service at night. There is an obvious need for both the specialized programming proposed by BCI and the general market programming proposed by Genesis. Therefore, neither applicant is due a preference for its proposed programming.[4]

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[2]*See* paras. 28 and 29 of the Initial Decision, 93 FCC 2d 1176, 1184-86 (1982).

[3]Station WOJO would provide the only Spanish language radio service at night to an area of 833 square miles in which 116,000 Hispanics live. *See* BCI Exhibit 17, pp. 5-7. Evanston, which is BCI's city of license, has a population of 80,113, of which 1,715 persons are Hispanic.

[4]Our action herein is consistent with our award of a substantial preference to American International Development, Inc. (AID) for its proposed Spanish language programming in *American International Development, Inc. (AID)*, 75 FCC 2d 67, 96, 107 (ALJ 1979), *affirmed*, 86 FCC 2d 808, 818 (1981). AID was an applicant for a new FM station to be licensed to Phoenix, Arizona, which was already being served by several stations with general market formats. In *AID* we found that a significant Hispanic population resided *both* in Phoenix and within the rest of AID's proposed 1 mV/m contour and that there was a dearth of Spanish language programming in the Phoenix area. In the case now before us, BCI's community of license is Evanston, Illinois, which has about 1,700 Hispanics out of a total population of about 80,000. Thus, there is only a small Hispanic population in Evanston. Further, Station WONX, a daytime-only commercial radio station licensed to Evanston, is a Spanish language station. Lastly, we note that WOJO is the only fulltime broadcast station assigned to Evanston.

3. Except for our determination that BCI should not receive a preference for its specialized programming, we concur in all significant respects with the Review Board's decision herein. Thus, we agree that BCI's past broadcast record was substantial as defined by *Cowles Broadcasting, Inc.*,[5] and therefore deserves a significant comparative preference or what is termed a "renewal expectancy," which outweighs Genesis' integration and diversification preferences. We also concur with the Board's assessment of a moderate demerit against Genesis for exhibiting carelessness in filing and prosecuting its application through the hearing process.[6] Therefore, BCI is the clear winner in this proceeding.

4. However, Genesis has raised arguments concerning BCI's past broadcast record which warrant further comment. Genesis claims that BCI has provided truly minimal service to the residents of Evanston, Illinois. Several individuals, including two Evanston aldermen, stated that Station WOJO was not responsive to Evanston's needs and interests because too much of its programming was in Spanish and directed to audiences residing mostly outside of Evanston. Without making any specific reference to Station WOJO, a third alderman expressed his interest in having a station in Evanston which would broadcast a significant amount of English language programming, while a fourth alderman stated that Evanston needed more locally-oriented programs. None of the aldermen's statements explained whether their comments related to the license term being examined in this proceeding (*i.e.*, 1973-1976) or the

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[5]86 FCC 2d 933, 1006 (1981), *affirmed sub nom., Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

[6]In its Application for Review, BCI argues that the Review Board erred when it failed to overrule the Presiding Judge's refusal to add a basic disqualifying issue against Genesis for neglecting to report the filing of a criminal complaint against Mr. Renken, who is Genesis' President, as required by Section 1.65 of our Rules. This argument is now moot. The hearings have been completed and BCI has proven itself to be the winner based on the existing record. There is no reason to conduct further hearings to determine whether Genesis should have lost by a wider margin than the present record indicates.

degree to which they were familiar with Station WOJO's programming.[7] Further, none of the foregoing witnesses identified any local public issues which might have been omitted by the licensee. Other testimony praised WOJO for its public service to Hispanics in Evanston and the Chicago metropolitan area. The subjective preferences of various witnesses, both pro and con, do not provide a basis for altering the conclusion that BCI's past broadcast record was substantial and thus merits a significant comparative preference in this proceeding. In this respect, paragraph 4 of the Review Board's Decision summarizes the portion of the evidentiary record which provides a basis for an objective analysis of the licensee's broadcast record.

5. Further, Genesis argues that BCI fell short of broadcasting the amount of news and public affairs programs it stated it would broadcast during the relevant license term of 1973 to 1976. In its 1973 renewal application, BCI proposed to provide 21.49 percent of its overall programming in the following nonentertainment categories: news, 5 percent; public affairs, 1.49 percent, and all "other" programs (exclusive of entertainment and sports), 15.0 percent. In its 1976 renewal application, BCI initially computed the following percentages of its programming as constituting nonentertainment programs presented during the composite week: news, 4.1 percent; public affairs, 0.3 percent, and all "other" programs, 14.0 percent, for a total of 18.4 percent. BCI recomputed those percentages most recently in October 1981, explaining that it had misread some of the programming logs in previous computations. These most recent figures are: news, 5.3 percent; public affairs, 0.3 percent; and "other" programs, 15.3 percent for a total of 20.9 percent nonentertainment programming.[8] Although Genesis appears to be relying upon the initial 1976 computations, it has not demonstrated that the most recent figures are not reliable. Like the Review Board, we accept the most recent computations as accurate. Thus, BCI did not broadcast the amount of

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[7]One alderman stated that he was not familiar with WOJO's programming.

[8]*See* paras. 32-35 of the Initial Decision, 93 FCC 2d 1176, 1186-87.

public affairs it proposed, but exceeded the amount of news and "other" programming it had initially planned to air. Further, BCI has given an adequate explanation as to why it broadcast so few public affairs programs, namely, that certain entities which produced those programs discontinued producing them.[9]

6. We find that there is no significant discrepancy between BCI's proposed (21.49 percent) and performed nonentertainment programming, whether one relies on the original (18.4 percent) or the most recent (20.9 percent) computations for BCI's composite week. Further, whether one utilizes the original or the most recent computations for BCI's composite week, BCI exceeded the average and median percentages of nonentertainment programming broadcast during the composite week by the other commercial FM stations serving the Chicago area.[10] Just as we compared similarly situated television licensees in *Cowles Broadcasting, Inc.*,[11] we find it more meaningful in measuring BCI's performance to compare similarly situated FM stations than to compare all radio stations in the Chicago market.[12]

7. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review of the Review Board's Decision herein filed May 4, 1983, by Genesis Broadcasting Limited IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects, the Application for Review of the Review Board's Decision herein filed May 4, 1983, by Broadcast Communications, Inc. IS DENIED, and the Review Board Decision, FCC 83R-24, released April 4, 1983, IS MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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[9]*See* BCI Ex. 23, p. 205.

[10]*See* the chart in paragraph 36 of the Initial Decision, *supra*.

[11]86 FCC 2d 993, 1006-07 (1981).

[12]*See* para. 36, note 10 of the Initial Decision, *supra*.

Appendix D

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 83R-24
3262

In re Applications of

BROADCAST COMMUNICATIONS, INC. **Evanston, Illinois** **For Renewal of Main Auxiliary and Sub-Carrier Authorization Licenses of Station WOJO (FM), Evanston, Illinois**	**BC Docket No. 81-157** **File Nos. BRH-85** **BRSCA-206**
GENESIS BROADCASTING LIMITED **Evanston, Illinois** **For Construction Permit**	**BC Docket No. 81-158** **File No. BPH-10386**

APPEARANCES

Brian M. Madden and *Stanley B. Cohen* for Broadcast Communications, Inc.; *Aaron Shainis* and *Robert L. Olender* for Genesis Broadcasting Limited; and *Norman Goldstein* and *Charles W. Kelley* for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: March 25, 1983 Released: April 4, 1983.

Board Chairman Marino for the Review Board:

1. This comparative renewal case began when Broadcast Communications, Inc., licensee of Station WOJO(FM) in Evanston, Illinois sought renewal after its 1973 to 1976 license term. A competing application for Station WOJO's FM channel was filed by Genesis Broadcasting Limited leading to a trial type comparative hearing in 1981. In his Initial Decision, FCC 82D-61, released August 26, 1982, Administrative Law Judge Kuhlmann selected Station WOJO(FM) as the best comparative applicant. Genesis was awarded a slight to moderate preference for participation of ownership in management, which was overcome by (1) a moderate demerit assessed against Genesis for carlessness in prosecuting its application, (2) Station WOJO's substantial preference for proposing specialized programming utilizing a Spanish language format, and (3) a very slight renewal expectancy preference for WOJO's past performance. I.D., at para. 69. Our review of the Initial Decision is guided by the standards set out by the Commission in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), which was affirmed by the Court in *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503, 51 RR 2d 1405 (D.C. Cir. 1982). *See also Radio Station WABZ, Inc.*, 90 DCC 2d 818 (1982); *Simon Geller*, 90 DCC 2d 250 (1982). After considering the record in the light of the briefs and exceptions filed October 22, and November 15, 1982, and the oral argument held January 6, 1983, the Review Board has concluded that the ALJ's findings of fact are substantially complete and accurate. Therefore, except as modified or amplified in this Decision, those findings are adopted. We affirm the ALJ's renewal of Station WOJO(FM)'s license but our reasoning differs somewhat, especially with respect to the station's past performance which we find to be substantial for the reasons set out below, paras. 4-14. Other major points which have been briefed/and which are discussed below concern WOJO's proposed specialized programming, paras. 15-18; diversification of mass media, paras. 19-20; participation of ownership in management, paras. 21-23; and Genesis' demerit for carelessness, paras. 24-25.

2. *Background.* Station WOJO(FM), which began independent operation on February 1, 1947, has carried foreign lan-

guage and other specialized programs, often on a brokered basis, since 1956. BCI exh. 2, p. 5. From 1953 through 1981, the licensee of Station WOJO(FM) was also the licensee of an AM Station in Evanston. *Id.* English language news and public service offerings were broadcast on both the AM and FM stations although little, if any, of the broadcasting was duplicated. In the early 1970's, Station WOJO(FM) was authorized to provide a city grade signal, the highest quality of service, over all of the Chicago city limits, in addition to Evanston. In 1971 it was granted authority to employ a dual city identification as Evanston-Chicago. *Id.*, at P. 6. At the beginning of the 1973-1976 license term in question, the proportion of foreign language programming on Station WOJO(FM) had increased to 53% of all of its programming, predominately composed of Spanish language presentations. *Id.* While Station WOJO(FM)'s application for renewal was pending, Edward Wheeler, one of the founders of the station and the individual responsible for the station's daily operation through the 1973-1976 license term, died on November 25, 1977. After his death, control of the corporation reverted to the other stockholders in proportion to their ownership interests. These principals substantially increased the time devoted to Spanish programming so that by 1979 all foreign language programming, more than 23 hours per day, was in Spanish. *Id.*, at p. 7. By February 1980, all brokerage arrangements were terminated. *Id.*

3. Subsequent to the filing of the applications in this proceeding, the Commission altered its regulatory policies toward AM and FM radio. *See, Report and Order on Deregulation of Radio*, 84 FCC 2d 968 (1981), *recon. denied* 87 FCC 2d 797 (1981), *review pending sub nom. Office of Communications of the United Church of Christ* v. *FCC*, Case No. 81-1032 (D.C. Cir. filed January 14, 1981). These new policies are applicable to all new facilities applications and to those portions of renewal applications which relate to future proposals. 84 FCC 2d at 1012-13. However, Station WOJO's *past performance* record

will be evaluated in accordance with pre-radio deregulation policies. *See Simon Geller, supra,* 90 FCC 2d at 252.

4. *Past Programming:* During the 1973-1976 license period, Station WOJO(FM) presented 5.3% news, 0.3% public affairs, and 15.3% all other non-entertainment programming. I.D., para. 34, These percentages do not include additional news, public affairs and informational matters which were broadcast by the station on its brokered non-English programming but not logged separately I.D. para. 39. In this regard, Enrique S. Lopez, who provided two hours of brokered Spanish programming daily (Tr. 643) and was typical of the Spanish language brokers (Tr. 644-45), testified that 60% of his programming was entertainment and 40% was news, information, and public service announcements. Tr. 650. The ABC Entertainment Network News provided Station WOJO(FM) 5 minutes news per hour on the half hour except during those hours when the foreign language news was regularly broadcast. I.D. para. 39. Community problems, needs and interests considered by the licensee to be most significant were dealt with on "Shape of Today," a thirty-minute program aired Sunday mornings from 8:30 to 9:00, featuring interviews with local community leaders and on a number of local religious services broadcast on Station WOJO(FM). See I. D., para. 37; BCI Exh. 23, pp. 9-10. Various foreign language programs that were part of its brokered format also contained information that helped meet the needs of the group being served. I.D., para. 38. Finally, during the composite week of December 7-13, 1975, Station WOJO(FM) broadcast 576 public service announcements responsive to community problems. BCI Exh. 23, p. 10; I.D., at para. 33.

5. Since 1961, Station WOJO(FM) has been continually assisted in providing programming responsive to the needs of the community by an Advisory Board which meets annually. I.D., at para 40. The Board is composed of community leaders in Evanston and its environs including the mayor, city manager, police chief, librarian, and superintendent of schools of Evanston as well as professors from Northwestern University, lo-

cated in Evanston, and leaders of the religious, publishing, and business communities. BCI Exh. 23, pp. 25, 100, 140, 172.

6. In his Initial Decision the ALJ concluded that WOJO(FM) fell short of the amount of news and public affairs programming indicated in its 1973 renewal application where it proposed 5% news, 1.49% public affairs, and 15% all other non-entertainment programmin. I.D. at para. 41. In fact, WOJO only fell below its 1973 proposal for public affairs programming and exceeded its promises concerning news and all other non-entertainment programming. Prior to the hearings, WOJO responded to a Commission staff inquiry that it had broadcast certain public affairs programs at the beginning of the license term but was forced to discontinue the programs after the local groups providing such programs quit producing them for various reasons. BCI Exh. 23, p. 205. It noted, however, that since it first began operations, it had broadcast public affairs programs substantially exceeding Commission guidelines. *Id.* It also pointed out that certain of its foreign language programming such as "Hellenic Interlude," a Greek program, had received community awards for public service in a dinner attended by leaders honoring the fifteenth anniversary of the airing of the program. *Id.*, at p. 206. The stipulated testimony of six Evanston residents who did not speak or understand Spanish was submitted along with the testimony of a former station employee that was critical of the station's past performance. I.D. at paras. 42, 43. Station WOJO(FM) was awarded a very slight renewal perference by the ALJ because it did little to initiate news or public affairs programming, relying instead on station programming provided by the station brokers, I.D., at paras. 68, 69.

7. Station WOJO contends that it is entitled to a stronger preference for its past performance during the 1973-1976 license term than was awarded by the ALJ. (Br. p. 36) It also argues that the ALJ erred in not allowing it to place into evidence the past performance of Station WOJO(FM) under the direction of its present principals who took over the management of the station on the death of Edward Wheeler subse-

quent to the 1973-1976 license term. Genesis, on the other hand, contends in its exceptions that BCI is not entitled to any perference as a renewal applicant.

8. We agree that the broadcast record for Station WOJO(FM) during the 1973-1976 license term was substantial and thus we need not reach the question whether the ALJ erred in refusing to allow WOJO's post 1973-1976 record into evidence. As noted in *Cowles, supra*, and *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 51 RR 2d 1507(1982) a substantial record, sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal, gives rise to a renewal expectancy which in turn warrants a preference in comparative renewal proceedings. 90 FCC 2d at 839-40, 51 RR 2d at 1525. A substantial performance can be demonstrated by any type of showing reasonably related to demonstrating service over and above what would be considered minimal. Here, we believe such a showing was made. Quantitatively, as reflected by its composite week, Station WOJO(FM) devoted nearly 21% of its broadcast time to non-entertainment programming, which compares favorably with the amount of like time broadcast by the renewal applicant in *Radio Station WABZ, Inc., supra*, where the Commission characterized the licensee's record as superior. 90 FCC 2d at 839-40, 51 RR 2d at 1525. And this total omits the non-entertainment programming included in its non-English programming which would in reality substantially increase the amount of broadcast time Station WOJO(FM) devoted to non-entertainment programming. This record can be contrasted with *Simon Geller*, 90 FCC 2d 250, 51 RR 2d 1019 (1982), where the licensee devoted less than 1% of its broadcast time to non-entertainment programming and no renewal expectancy was awarded. 90 FCC 2d at 264-265, 271, 51 RR 2d 1032, 1038. Moreover, although much of the non-entertainment programming on the brokered programs is not included in the statistics above, the amount still exceeds the average and median percentages of the other commercial FM stations serving the Chicago area. I.D. aat para. 36. News and public affairs programs were broadcast in both English and Spanish. BCI

Exh. 23, p. 19; Tr. 650. In addition to the half hour program "Shape of Today," produced locally, Station WOJO(FM) broadcast live a number of local religious services. BCI Exh. 23, pp. 9-10. Moreover, Station WOJO(FM) broadcast a substantial number of public service announcements. I.D. at para 33.

9. The principal ingredient of a licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of its service area for broadcast service. *See WPIX, Inc.*, 68 FCC 2d 381, 400, 43 RR 2d 278, 303 (1978), paraphrasing from the *Programming Policy Statement*, 44 FCC 2303, 2316 (1960). Here, the record evidence reflects that WOJO has diligently and continuously taken steps to ensure that it is responsive to its service area's needs and tastes. Thus, since 1961, it has met annually with a Community Advisory Board composed of all types of community leaders concerning Station WOJO(FM)'s programming. BCI Exh. 23, pp. 97, 137, 168, 200. The 1973 annual report to the Advisory Board revealed that Station WOJO(FM) was helping the administration and students of Loyola Academy apply for and operate a 10 watt educational FM station at the Academy, making substantial donations of funds and equipment for this small educational station which had no access to public funds (*id.*, at p. 31); it had successfully solicited funds necessary to bring a small Greek child from Greece to Chicago for needed medical attention to permanently correct a heart defect (*id.*, at p. 32); and it had attempted unsuccessfully with the cooperation of Station WBBM-TV(CBS) to present a Spanish audio to go along with the video of the television station's evening news (*id.*, at p. 33). The experiment with Station WBBM-TV was discontinued after 3 1/2 months because it was too cumbersome and resulted in a slight decrease in the amount of news aired by Station WOJO(FM). *Id.*, at pp. 13, 33. Moreover, the report indicated that Station WOJO(FM) and its sister AM station were the only outlets carrying Big Ten Conference (*i.e.*, Northwestern) football and basketball games in the Chicago area, which has the heaviest concentration of Big Ten alumni (*id.*, at pp. 35, 146).

Station WOJO(FM) continued to carry the broadcasts because of the public interest in the games, notwithstanding that the expense of keeping them on the air exceeded the revenues they brought in (*id.*, at p. 146).

10. During the Community Advisory Board meeting for the year 1973, Board Member Dayton Grafman, vice-president at the National College of Education, praised Station WOJO(FM) for recognizing that there were a large number of Spanish speaking people in the Chicago area who needed radio facilities. *Id.*, at p. 97. And one of the station employees announced that Station WOJO(FM) had been given the top rating in FM Spanish broadcasting by eleven judges of the annual "Spanish-American Radio and TV Festival." *Id.* One of the other Board Members, James C. McLeod, professor emeritus, History and Literature of Religions Northwestern University, praised the station highly for its participation in community affairs. *Id.*, And Board Member Randolph R. Tomlinson, Editor and Publisher, *The North Shore Examiner*, Evanston's only Black newspaper (*id.*, at p. 205), stated that he was fimiliar with Spanish and that he listened to the Spanish programming on Station WOJO(FM) and found the quality to be excellent. *Id.*, at p. 97.

11. During the 1974 meeting, Board Member Ruben Cruz, columnist, *Chicago Sun-Times*, stated that the Spanish language programming aired on Station WOJO(FM) was of high quality and it served a necessary purpose. *Id.*, at p. 137. It was expressed at that time that Station WOJO(FM) appeared to be the principal Spanish-language outlet serving the Chicago metropolitan area and that such programming would therefore probably be increased. *Id.* The 1976 report to the Community Advisory Board revealed that Station WOJO(FM) once again carried the high school football and basketball tournaments and aired a presentation of the Award of Merit Trophy by Sports Illustrated magazine to a local high school athlete. *Id.*, at p. 180. Moreover, Station WOJO(FM) broadcast the Acción Rápida column of the *Chicago Tribune* as a public service to the Spanish-speaking population and supplied broadcast equip-

ment to students of a local high school to use in preparing a weekly public affairs program. WOJO(FM) Id., at p. 181.

12. Once the Advisory Board was aware that a competing application could be filed against Station WOJO(FM) at renewal time, the Board, without solicitation, demonstrated its support for the station by unanimously passing a motion to prepare a resolution supporting the continuation of the management of Station WOJO(FM). *Id.*, at pp. 200-201. In our view, the above facts reflect a pronounced and abiding public spirited commitment on the part of Station WOJO(FM) to its service area.

13. In awarding only a slight renewal preference for Station WOJO(FM) past performance, the ALJ was apparently primarily concerned that the station's broadcast day was limited for initiating its own news and public affairs programming because of the significant amount of broadcast time purchased by brokers who then determined the station's programming. Genesis also disparages Station WOJO(FM)'s past performance on the basis that much of its programming was "brokered" and that its total percentage of public affairs programming was low relative to the other stations in the market. We disagree with both of these assessments. An analysis of a licensee's relative responses to the important needs and tastes of its service area should focus on the licensee's overall program service rather than on isolated aspects of programming such as the source of certain programs or the program format used to treat such needs and tastes. *See WPIX, Inc., supra* at 400, 43 RR 2d at 304. The record as reflected by the evidence concerning the Community Advisory Board meetings establishes that the community leaders believed the non-English programming to be meritorious. Also the record reveals that Station WOJO(FM) exercised adequate controls on the brokers. Bureau Reply Br. 8-10. Thus, it required participating programs to include public service announcements and newscasts (BCI Exh. 23, at pp. 39-40) and limited the amount of advertising that could be broadcast. *Id.*, Tr. 651. We also recognize that the Commission encourages time brokerage since such a source of

programming has the potential to notably increase available program alternatives for audience segments whose demands would otherwise be left unmet. *See Policy Statement on Part-Time Programming*, 82 FCC 2d 107, 108, 48 RR 2d 763, 764 (1980). This is particularly true for foreign language audiences whose preferred programming is unlikely to attract a sizable cross-over audience. *Id.*, at p. 120, 48 RR 2d at 772. The Commission has emphasized that licensees should not be discouraged from exploring programming alternatives that appear to reflect accurately both consumer wants and competitive incentives. *Id.*

14. With respect to the limited amount of public affairs programming reflected by the composite week performance, it appears that a number of locally produced public affairs programs were aired at the beginning of the license term but were discontinued for reasons beyond the control of the licensee. BCI Exh. 23, p. 205. Had these existing programs continued to be broadcast, Station WOJO(FM) would have met or exceeded its public affairs proposals contained in its 1973 renewal application. In any event, statistics for the composite week are not the only means of determining a licensee's performance (*see WPIX, Inc., supra* at 401, 43 RR 2d at 305). Station WOJO(FM) has made pronounced and abiding efforts to be responsive to its service area as shown by its formation of one of the first Community Advisory Boards in the country. Thus, we need not rule on Genesis' exception that the ALJ improperly excluded the AM stations from his computations in comparing BCI's news and public affairs programming. Finally, with respect to the stipulated testimony concerning Station WOJO(FM)'s community reputation, we simply note that while there were very few individuals who understandably were critical of the foreign language programming since they did not speak or understand Spanish, there were other Spanish-speaking individuals who praised the station for providing information in Spanish relating to special needs of the Hispanic community. *See* Stipulated Testimony. Moreover, although one of the station's former employees was critical of its past perfor-

mance, even he acknowleged that the amount of news broadcast over Station WOJO(FM) was about average with that of other area stations. Tr. 638. On balance, we conclude that Station WOJO's past performance demonstrates a positive and dedicated commitment to serving its service area, which we characterize as sound, favorable, and substantial. Station WOJO(FM) is therefore entitled to a strong preference for its past programming. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1017, 49 RR 2d 113, 1160, *affirmed sub nom. Central Florida Enterprise, Inc.* v. *F.C.C., supra; WPIX, Inc., supra* at 406, 43 RR 2d at 310.

15. *Specialized Programming Issue.* Because Station WOJO (FM) proposes a specialized format of programming for Hispanics in its service area while Genesis proposes general market programming of jazz and rock music, the issues in this proceeding were enlarged to consider the relative need for these different types of programming throughout Station WOJO(FM)'s service area. Memorandum Opinion and Order, FCC 81M-2120, released July 15, 1981. WOJO proposes to broadcast and currently broadcasts, in Spanish twenty-three and one-half hours out of its twenty-four hour day. The findings of the Initial Decision, which are undisputed, reveal that more than 560,000 Hispanics live within Station WOJO (FM)'s service contour, 1,715 of whom reside in Evanston. I.D., at para 29. Twenty-seven percent speak only Spanish and another fifty-three percent speak primarily Spanish. *Id.*, at para. 27. There are fifty-five commercial radio stations which place a signal over Station WOJO(FM)'s service area, fifteen of which provide some amounts of Spnish language programming. *Id.*, at para 28. None of the stations, however, provides coverage comparable to that of Station WOJO(FM) either in terms of the total amount of broadcast hours or the size of the service area. *Id.*, at para. 29. While varying amounts of Spanish language programming are available during the day, the ALJ's findings show that during nighttime hours, Station WOJO(FM) provides *the only* Spanish radio service to an area of 833 square miles in which 116,000 Hispanics live. *Id.*, at para. 30. Station WOJO(FM)

also provides a *second* nighttime Spanish voice for 753 square miles containing another 370,000 Hispanics. *Id.* Genesis will not broadcast any Spanish programming. *Id.*, at para. 31. A substantial preference was awarded by the ALJ for Station WOJO(FM)'s format, premised on its demonstration that a substantial percentage of the Hispanic population receive and would continue to receive their only Spanish service at night and that many others would receive their second nighttime service in Spanish from WOJO. *Id.*, at para. 64.

16. Genesis argues that WOJO is not entitled to any preference for its proposed programming. (Br. 28). It points to the large number of stations in the market which provide Spanish language programming, and urges that there is no special need for more of such programs. It also argues that there is an absence of any need for Hispanic Programming in Evanston since only 1,715 Hispanics out of a total population of 80,113 people live there. Finally, it argues that a comparison of proposed programming is repugnant to the public interest, citing *F.C.C.* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981) for the proposition that a programming preference here is of dubious legality.

17. We conclude that the ALJ was correct in awarding a substantial preference under this issue. The purpose of a specialized programming inquiry is to ensure that a proposal which responds to truly unmet needs will be considered in our licensing procedures. *See George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465-466, 45 RR 2d 689, 694 (1979). Where the proposed programming is available in reasonable amounts, a preference will not be given. *See Flint Family Radio, Inc.*, 69 FCC 2d 38, 42-43 (Rev. Bd. 1977) cited with approval in *George E. Cameron Jr. Communications, supra.* Here, there is definitely a need within the service area for Station WOJO(FM)'s proposed format since denial of its application would leave approximately 116,000 Hispanics without any nighttime Spanish language programming and another 370,000 with only one nighttime voice. This would be a significant loss since twenty-seven percent of Hispanics in the Chi-

cago metropolitan area speak only Spanish. Moreover, there is some indication in the record that a substantial percentage of Hispanics did not grow up in the Continental United States and thus have greater informational needs than do the English-speaking population at large, particularly since many of the Hispanics are frequently handicapped by low educational levels. Tr. 522. *See American International Development, Inc.*, 75 ECC 2d 67, 96, 107 (ALJ 1979), *affirmed* 86 FCC 2d 808, 818 (1981), where an applicant received a substantial preference for its proposal to provide the only nighttime Spanish language programming.

18. Genesis' exceptions do not undermine the ALJ's reasons for awarding a substantial preference under this issue. The fact that there are many stations providing daytime Spanish language programming is not relevant here since the preference was awarded for providing a much needed nighttime service. Nor are we persuaded that the relatively low number of Hispanics residing in Evanston should be dispositive in disallowing a preference, as urged by Genesis. Denial of credit on this basis would in effect negate the credit due Station WOJO(FM) for providing the only nighttime Spanish voice to 116,000 individuals as well as deny Hispanics in Evanston a station which served their needs and tastes. We do not believe that such a result would be consistent with the public interest, particularly since there are more than fifty other stations providing a signal over Station WOJO(FM)'s service area. Moreover, the record contains evidence that the Hispanic community in Evanston needs Station WOJO(FM) to provide information in Spanish relating to its special needs. *See* Stipulated Testimony of Yolanda Salgado, a member of the Board of Associacion Latino de Evanston. In any event, the Commission's new regulatory thrust is to permit licensees in markets where there are a large number of stations to be more specialized in their program offerings. *See Deregulation of Radio*, *supra* at 988-989; *see also F.C.C.* v. *WNCN Listeners Guild*, *supra*. Genesis' reliance on *WNCN* is misplaced since the applicant in this case has selected its own specialized format and made the type of showing

entitling WOJO to a substantial comparative preference for its Spanish language programming.

19. *Diversification of Control of the Media of Mass Communications.* Genesis and WOJO's principals no longer own any other media interests. Subsequent to designation and two months prior to the hearing, the owners of Station WOJO(FM) sold their AM station in Evanston. The ALJ declined to attribute the AM station to WOJO's owners for diversification purposes, noting that Genesis was fully aware of the change before the hearing. Both applicants were found by the ALJ to be equal under the diversification criterion. Genesis excepts to the Initial Decision's failure to take common ownership of WOJO(FM) and the AM station into account under this criterion.

20. We agree with Genesis that the AM station was attributable to WOJO for comparative diversification purposes. A party to a comparative hearing is not allowed to improve its comparative position after a fixed date beyond which it is no longer permitted to amend as of right. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813, 51 RR 2d 409, 419 (Rev. Bd. 1982). After that point, competing proposals are generally considered to be fixed to ensure that the hearing proceeds in an orderly and timely fashion. *Id.* Here, there was no unequivocal commitment to divest prior to the fixed date. Thus, recognition of the divestiture of the AM station would be unfair to Genesis which prepared its case premised on the comparative position of the applicants prior to designation for hearing. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 130, 51RR 2d 46, 52 (Rev. Bd. 1982). Genesis is therefore entitled to a substantial preference under the diversification criterion. *See Nuance Corp.*, 85 FCC 2d 412, 420, 49 RR 2d 147, 154 (Rev. Bd. 1981). Consistent with the approach set forth in *Cowles Broadcasting, Inc., supra*, the weight to be accorded to Genesis' diversification preference will be determined in the overall comparative evaluation of the applicants.

21. *Participation of Ownership in Management.* Genesis is made up of two stockholders. Both propose to work full time at the station in managerial positions. I.D., paras. 9, 12. Both live or have lived in Evanston and have some broadcast experience. *Id.*, at paras. 10-12. Neither has been active in Evanston community activities. *Id.*, at paras. 52-53. Genesis' 20% stockholder is a minority female. *Id.*, at para. 12. Station WOJO has four stockholders; three of whom, owning voting power over 96.5% of the stock, propose to work at the station in managerial positions. Jane D. Hall, a 55.6% stockholder and a resident of an adjacent community to Evanston, will work full time; her husband, a 4.5% shareholder, will work approximately 30 hours per week; and Letitia Wheeler, the executrix of the estate of Edward A. Wheeler, who votes 35.4% of the shares, proposes to spend 35 hours per week at the station. *Id.*, at paras. 5-8. Mrs. Wheeler is a non-resident of Evanston. *Id.*, at para. 8. All three currently work at the station in managerial positions and both Mrs. Hall and Mrs. Wheeler are active in Evanston community affairs. *Id.*, at paras. 49, 51. Genesis was awarded more quantitative full-time integration credit by the ALJ who remarked that this was somewhat offset by the facts that 91% of WOJO's stock is voted by women, that Genesis' stockholders have no managerial broadcast experience, and that Genesis 80% stockholder, Henry C. Renken, has been fired several times from broadcast stations. Genesis was therefore awarded only a slight-to-moderate preference for its participation proposal.

22. Genesis argues in its exceptions that it is entitled to a substantial preference, based primarily on the quantitative full-time proposals of both applicants: 100% v. 55.6%. It argues, too, that Mrs. Wheeler is entitled to only 17.7% part-time integration credit since under her husband's will half of the stock she votes will go to her children. Finally, Genesis claims that it was error to consider the absence of managerial experience and Mr. Renken's broadcast employment history as detractions from its integration proposal. On the other hand,

WOJO claims that neither applic..t is entitled to a preference under this criterion.

23. We conclude that Genesis is entitled to a moderate preference for its integration proposal. In our view, Genesis is entitled to 100% full-time integration credit to WOJO's 55.6% full time and 22.2% substantial time. *See Van Buren Community Service*, 87 FCC 2d 1018, 1021, 50 RR 2d 115, 118 (Rev. Bd. 1981) (proposal to work 30 hours per week considered substantial time). We will not credit Mrs. Wheeler with the full 35.4% of the stock she now votes since there is no indication in the record that the terms of Mr. Wheeler's will—under which she would get only 17.7% of the stock—will not be performed. In reaching our determination that the preference is a moderate one, we have taken into account that the amounts of time proposed by Mrs. Wheeler and Mr. Hall differ very little from full time and that WOJO's proposal is more qualitatively enhanced because of its principals' managerial broadcast experience and Mrs. Hall and Mrs. Wheeler's involvement in Evanston community affairs. Genesis, of course, has the advantages of its greater quantitative credit, the local residence of its principals and the minority and female status of its 20% principal. We will not fault Mr. Renken for his checkered broadcast employment history as did the ALJ because of the incompleteness of the record. Nor do we hold that the absence of managerial broadcast experience detracts from Genesis' integration proposal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 848, 50 RR 2d 1117, 1131 (Rev. Bd. 1981). As was the case with diversification, the weight to be accorded Genesis for its participation preference will be determined in the overall comparative evaluation of the applicants.

24. *Carelessness and Certification Issues.* Genesis was assessed a moderate demerit under carelessness and certification issues. The carelessness issue related to Genesis' errors in providing accurate information about three matters: the employment experience of Henry Renken; an EEO plan for the station which describes the station's past practices which was inapplicable here since Genesis had no previous station; and the

views reported for various community leaders in its ascertainment survey. The certification issue involved the use of a presigned certification page in filing an amendment to Genesis' application. This act was contrary to the representation on the certification page that the signatory has reviewed the submission, *i.e.*, the amendment, before signing the certification page. There was no evidence of concealment or misrepresentation and the omissions concerning the EEO plan and precertification matters were not decisionally significant. The ALJ held that these matters resulted from inattention and carelessness. But, the omissions relating to Renken's employment history were decisionally significant since they reflected on his past broadcast employment record, which the ALJ found to be poor. And Renken deliberately chose not to report all of his job changes since he felt that such reporting changes would delay resolution of the proceeding. This behavior was characterized by the ALJ as exhibiting bad judgment. Genesis excepts to the imposition of the demerit.

25. After some reflection we affirm the ALJ on these matters. Omissions may be excused if they are not deliberate or decisionally significant and there is no intent to mislead or conceal. *See Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210, 1220 (Rev. Bd. 1982). Perhaps both we and the ALJs have come to tolerate too much sloppiness in the preparation and prosecution of applications, especially where there is no intent to deceive. *See, e.g., HLD&M Communications, Inc.*, FCC 83R-18, released March 17, 1983, para. 8. Here we concur with the ALJ that the pattern of carelessness, inattentiveness, and poor judgment displayed by the applicant (who sought credit for his broadcast experience) is something that should not be encouraged. *See Radio Station WABZ, Inc., supra*, at 827. Such carelessness engenders protracted litigation and unduly wastes limited hearing resources. As the ALJ pointed out the record evidence is clear that the omissions concerning Renken's employment history were *deliberate* and not inadvertent. Moreover, the information was of potential decisional significance since the parties argued at hearing over Renken's al-

legedly poor broadcast record. We agree with the ALJ, however, that there is no evidence to establish that Renken intended to deceive the Commission; rather, his actions appear to have been motivated by poor judgment. A moderate demerit will be imposed against Genesis on these matters and will be considered together with all the other relevant comparative factors.

26. *Other Matters.* Genesis excepts to the ALJ's failure to add two issues it sought (a) whether WOJO exercised sufficient control over its brokered programs; and (b) whether WOJO made good faith efforts to carry out its non-entertainment programming set out in its 1973 renewal application. We will deny Genesis' exceptions. The Board has reviewed the ALJ's Memorandum Opinion and Order denying the requested issues (FCC 81M-2120, released July 15, 1981) and concludes that it adequately and persuasively sets forth sufficient reason why the requested issues should be denied. *See also* the Bureau's Br. 8-11. Further discussion on this matter is unnecessary. WOJO also claims that the ALJ erred in not adding a reporting issue, and in not expanding the carelessness issue, against Genesis based on further reporting omissions. These exceptions, too, will be denied as being of no decisional significance since a moderate comparative demerit was assessed against Genesis and the derelictions, even if proven, would merely be cumulative.

27. *Overall Comparative Evaluation;* Several recent comparative renewal cases mentioned above, para. 1, establish that primary significance is accorded a broadcaster's past performance since that factor affords the strongest and most reasonable basis for determining whether the public will be served by license renewal. A broadcaster who renders meritorious service can reasonably be confident of renewal. Thus, an incumbent with substantial past performance is awarded a comparative preference, the weight of which may overbalance the factors of diversification and participation which are usually decisive in comparative proceedings involving only initial licensing. *See Cowles Broadcasting, Inc., supra,* at 1015. In affirming the

Cowles decision, the Court cautioned that relevant factors "are all to be weighed, all at once, all with an eye toward the public interest. Nothing is removed from the scales until the balance is struck." *Central Florida Enterprises, Inc.* v. *FCC, supra*, 683 F.2d at 507 n. 16. Like the ALJ we will now weigh all the relevant factors. Based on our own review of its past performance we have found that Station WOJO is entitled to a strong preference. Moreover, we agree with the ALJ that WOJO is also entitled to a substantial preference for its proposed format of Spanish language programming which appears to have evolved from its past experiences and the wide area coverage of its station. Genesis on the other hand is entitled to a substantial preference for diversification and a moderate preference for participation, which in the present context, are of lesser comparative significance than WOJO's preferences. Its preferences are further diminished by the demerit which the ALJ correctly awarded for carelessness. Together, Genesis' preferences are not sufficient to outweigh WOJO's preferences for past and proposed programming service.

28. ACCORDINGLY, IT IS ORDERED, That the application of Broadcast Communications, Inc. for renewal of the main, auxiliary, and sub-carrier authorization licenses for Station WOJO(FM), Evanston, Illinois (File Nos. BRH-85 & BRSCA-206) ARE GRANTED, and the application of Genesis Broadcasting Limited (File No. BPH-10386) IS DENIED.

Joseph A. Marino
Chairman, Review Board
Federal Communications Commission